

MEMORANDUM

TO: Commissioners

FROM: Rick Frank
Deputy Attorney General

DATE: July 16, 1993

RE: Draft Regulations Regarding Appeal Process

Attached for your review are draft regulations outlining the process for appealing local government permits to the Delta Protection Commission. At the July meeting, I will brief the Commission and answer questions from the Commission during the Attorney General's Report.

The regulations are scheduled for possible adoption at the August meeting. No action will be taken at the July meeting.

**NOTICE OF PROPOSED ADOPTION OF
REGULATIONS GOVERNING HEARING PROCEDURES**

NOTICE IS HEREBY GIVEN that the Delta Protection Commission intends to adopt regulations governing appeals to the Commission from certain actions taken by local governments under the Delta Protection Act, Public Resources Code § 29700 ff. Pursuant to Public Resources §§ 29770-29772, the regulations will establish the procedures to be used by the Commission in processing, hearing and resolving appeals from certain local government decisions which the Commission is required to consider under the Act.

A written comment period has been established commencing on June 28, 1993, and terminating on August 26, 1993. Any interested person may present written comments concerning the proposed regulations to be received no later than August 26, 1993, to the Delta Protection Commission, c/o Richard Frank, Supervising Deputy Attorney General, California Department of Justice, 1515 K Street, Sacramento, California, 95814. The Commission will hold a public hearing on this matter on Thursday, August 26, 1993, at 6:30 p.m. at the Jean Harvie Community Center, 10473 River Road, Walnut Grove, California.

Copies of the proposed regulations and all of the information upon which they are based may be obtained from the Delta Protection Commission, c/o Richard Frank, Supervising Deputy Attorney General, California Department of Justice, 1515 K Street, Sacramento, California, 95814. The Delta Protection Commission has also prepared a written explanation of the reasons for the regulations and the specific features being proposed and has available all of the information upon which its proposal is based. Any inquiries concerning the proposed regulations should be directed to the Delta Protection Commission, c/o Richard Frank, Supervising Deputy Attorney General, California Department of Justice, 1515 K Street, Sacramento, California, 95814.

The Delta Protection Commission must determine that no alternative considered by the agency would be more effective in carrying out the purpose for which the regulations are proposed or would be as effective and less burdensome to affected private persons than the proposed regulations. (Public Resources Code § 29770(b) specifically requires the Commission to adopt regulations governing these administrative appeals.)

INFORMAL DIGEST

The Delta Protection Act of 1992 creates the Delta Protection Commission, a 19-member state entity with certain land use planning responsibilities concerning the Sacramento-San

Joaquin Delta. Among its statutory duties, the Commission is directed to hear administrative appeals brought by aggrieved persons who seek review of certain local government land use decisions affected by the Act.

The regulations currently proposed by the Commission would establish the administrative procedures governing the Commission's consideration of these land use appeals. The Legislature has specifically directed the Commission to adopt such regulations. (Public Resources Code § 29770(b).)

COST TO LOCAL AGENCIES AND SCHOOL DISTRICTS

The Delta Protection Commission has determined that this proposal imposes no mandate on local agencies or school districts.

Cost or savings to any state agency: None.

Cost to any local agency or school district in which reimbursement is required under Part 7 (commencing with Section 17500) of Division 4 of the Government Code: None.

Other nondiscretionary cost or savings imposed on local agencies: None.

Cost or savings in federal funding to the state: None.

EFFECT ON HOUSING COSTS AND SMALL BUSINESS

The adoption, amendment, or repeal of the proposed regulation will have no significant effect on housing costs or on private persons, businesses, or small businesses.

(INITIAL) STATEMENT OF REASONS
SUPPORTING ADOPTION OF REGULATIONS

DELTA PROTECTION COMMISSION

The Delta Protection Act of 1992 (Pub. Resources Code § 29700 ff.) creates the Delta Protection Commission, a 19-member state body with specified land use planning responsibilities concerning the Sacramento-San Joaquin Delta region. Among its prescribed duties, the Commission is directed to hear and decide administrative appeals brought by "aggrieved persons" who seek Commission review of certain local government land use decisions affected by the Act. (Pub. Resources Code §§ 29770-29772.)

In the Act, the Legislature specifically directs that "[t]he commission shall, by regulation, adopt administrative procedures governing these appeals." (Pub. Resources Code § 29770(b).) The regulations currently proposed by the Commission are intended to carry out that express legislative directive. They are designed to establish the procedures by which the Commission will process, consider and resolve administrative appeals brought before it under the Act. Since the Legislature has specifically directed that the Commission adopt such regulations, no alternatives to the adoption of proposed regulations are legally possible, and none have been considered by the Commission.

In drafting the proposed regulations, Commission staff have considered similar procedural measures previously adopted by state and local governmental entities, including regulations that have been reviewed and approved by the Office of Administrative Law. To the extent applicable, some of the provisions of those existing measures have been incorporated as part of the proposed Commission regulations.

(PROPOSED) REGULATIONS
DELTA PROTECTION COMMISSION

§ 1 Purpose

These regulations establish the procedures by which the Delta Protection Commission processes, considers and resolves appeals from local governmental decisions which are brought before the Commission under the provisions of Public Resources Code §§ 29770-29772.

§ 2 Time for Appeal

A person aggrieved by any action taken by a local government which falls within the criteria established in Public Resources Code § 29970(a) may file an appeal with the Commission within 30 calendar days of the date on which the pertinent local government has taken final action concerning the matter being appealed.

§ 3 Contents and Filing of Appeal

An appeal brought under these regulations shall be in writing and shall contain at least the following information:

- a) the name and address of the appellant;
- b) the name and address of the third party, if any, whose proposal is the subject of the appeal and the local government action being appealed;
- c) a description of the proposal or development that is the subject of the local government action being appealed;
- d) the identity of the local governmental body whose action is being appealed;
- e) the names and addresses of all persons who submitted written comments or who spoke and left his or her name at any public hearing regarding the local government action being appealed;
- f) the names and addresses of all other persons known by the appellant to have an interest in the matter on appeal;
- g) the specific ground(s) for appeal; and
- h) a detailed statement of facts on which the appeal is based.

The appeal shall be considered "filed" with the Commission when the original letter from the appellant is received and stamped "Filed" by the Commission with the date of filing indicated.

§ 4 Grounds for Appeal

The grounds for appeal of a local government action shall be limited to those specified in Public Resources Code § 29770(a).

§5 Commission Procedures Upon Receipt of Appeal

Within three working days of receipt of an appeal, the executive director of the Commission shall:

- a) post a notice and brief description of the appeal in a conspicuous location in the Commission office;
- b) mail to the affected local government a copy of the same notice and brief description, together with a copy of the appeal document(s) filed with the Commission;
- c) mail to the affected third party, if any, identified in § 3(b) above a copy of the notice and brief description, together with a copy of the appeal document(s) filed with the Commission; and
- d) mail copies of the notice and brief description to each member of the Commission.

§6 Effect of Appeal

Upon receipt of a timely appeal, the executive director shall notify the affected local government and the third party, if any, identified in § 3(b) above that the operation and effect of the local government's action has been stayed pending Commission action on the appeal as required by Public Resources Code § 29771. Upon receipt of an appeal, the executive director shall request from the affected local agency prompt delivery of all relevant documents and materials used by the local government in its consideration of the action being appealed. If the Commission fails to receive the documents and materials on a timely basis, the Commission shall commence a hearing on the appeal as provided in § 9, below, but shall leave the hearing open until all such relevant documents and materials are received and reviewed by the Commission.

§ 7 De Novo Review

The Commission shall conduct a de novo review of the local government action being reviewed.

§ 8 Standard of Review

The standard of Commission review of any appealable local government action shall be whether that action meets the requirements of Public Resources Code § 29770(a).

§ 9 Determination of Commission Jurisdiction/Appealable Issue

a) The Commission's appellate review shall be conducted in two sequential phases. At the first available Commission meeting following receipt of an appeal, but in no event more than 60 days thereafter, the Commission shall determine by majority vote whether the appeal:

i) raises issues not within the Commission's jurisdiction;
or

ii) does not raise an appealable issue.

b) If the Commission finds either that the appeal raises issues outside the Commission's jurisdiction or that it fails to raise an appealable issue, the Commission shall dismiss the appeal. That dismissal constitutes final Commission action from which judicial review may be taken under Public Resources Code § 29772.

c) The Commission shall make the determination set forth in subsection (a) only after Commission staff has presented a recommendation, orally or in writing, on the questions presented.

§ 10 Hearing on Merits of Appeal

Unless the Commission dismisses the appeal for the reasons set forth above, the Commission shall proceed to hear the appeal on its merits at the Commission's next available, regularly-scheduled meeting.

§11 Evidence and Hearing Procedures

a) Hearings conducted by the Commission under these regulations shall be conducted in a manner deemed most suitable to ensure fundamental fairness to all parties concerned, and with a view toward securing all relevant information and material necessary to render a decision without unreasonable delay.

b) Hearings need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be considered if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in a court proceeding. Unduly repetitious or irrelevant evidence shall be excluded upon order of the Commission or its chairperson.

c) Evidence before the Commission includes, but is not limited to, the record before the local government whose action is being appealed. Except in unusual circumstances, the record will not include a transcript of the local government proceedings unless

provided by a party to the proceedings.

d) Speakers' presentations shall be to the point and shall be as brief as possible. Visual and other materials may be used as appropriate. The Commission may establish reasonable time limits for presentation(s); such time limits shall be made known to all affected persons prior to any hearing. Where speakers use or submit to the Commission visual or other materials, such materials shall be come part of the hearing record and shall be identified and maintained as such. Speakers may substitute reproductions of models or other large materials but shall agree to make the originals available upon request of the executive director.

e) Commissioners may ask questions of the appellant, the affected local government's representative(s), any affected third party(s) appearing at the hearing, staff or the Commission's legal counsel. Questioning of speakers at the hearing by other persons shall not be permitted except by permission of the Chairperson.

§ 12 Commission Decision on Merits of Appeal

a) The Commission's determination on the merits of an appeal brought under Public Resources Code § 29770 shall be by majority vote.

b) The Commission's decision shall be deemed final upon the taking of the vote, unless the Commission directs that written findings be prepared for consideration by the Commission on a subsequent date. If such findings are prepared, the Commission action shall be deemed final upon the date the findings are adopted by the Commission.

c) Written Commission findings, if any, shall be prepared by staff and presented to the Commission for consideration at the next regularly-scheduled meeting following the Commission's vote on the merits of the appeal. The time for preparation of findings may be extended by the Chair in appropriate circumstances.

§ 13 Notification of Commission Action

The Commission shall notify the local government, the appellant and the affected third party, if any, identified in § 3(b) of each formal action taking by the Commission under §§ 9 and 10. The notification shall be transmitted by the Executive Director within ten working days of the Commission's formal action.

§ 14 Ex Parte Contacts

a) Decisions of the Commission on appeals heard under Public Resources Code § 29770 shall be based strictly on the evidence

presented during the public hearing. The Commission shall not rely upon any communications, reports, staff memoranda, or other materials prepared in connection with a particular appeal unless those materials are made a part of the hearing record.

b) If commissioners receive written or oral communications from third parties concerning a pending appeal outside the formal hearing process, they shall disclose, on the record and prior to a Commission vote on the appeal, both the existence and substance of the communications.

Authority cited for each of the above regulations: Public Resources Code § 29770(b).

Reference for each of the above regulations: Public Resources Code § 29770-29772.

